APPEAL NO. 020491
FILED APRIL 24, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 12, 2002. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) _____, compensable injury did not include major depression and that the claimant was not entitled to supplemental income benefits (SIBs) for the second compensable quarter. The claimant appealed on sufficiency grounds, arguing, alternatively, both total inability to work and satisfactory participation in a full-time Texas Rehabilitation Commission (TRC) vocational rehabilitation program during the qualifying period for the second SIBs quarter. The respondent (carrier) responded, urging that we affirm the hearing officer's decision and order in its entirety.

DECISION

Affirmed in part, reversed and rendered in part.

The hearing officer did not err in determining that the claimant's _____, compensable injury did not include major depression. The hearing officer relied upon several factors adduced at the hearing, including that the claimant worked after her compensable injury for over a year before being hospitalized for depression, and that one of her doctors commented in her medical records that the claimant had been very stressed by her work situation and coworkers. The claimant did present conflicting evidence, but the hearing officer is the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). While another fact finder may have reached a different conclusion, this tribunal will not substitute an opinion for that of the hearing officer, and finding that the determination is sufficiently supported by the record, and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, we affirm the extent-of-injury conclusion. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer did not err in determining that the claimant was not entitled to SIBs for the second quarter. The claimant proceeded on two theories at the CCH: that she had a total inability to work; or, that she had satisfactorily participated in a TRC-sponsored, full-time vocational rehabilitation program. The parties stipulated that the claimant met the general eligibility requirements. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) (general eligibility requirements) and Rule 130.102(d) and (e) (specific "good faith effort" requirements). Initially, the hearing officer resolved, with sufficient support in the record, that the claimant did have some ability to work, and so the claimant did not have a successful "total inability" claim. In addition, the hearing officer determined that the claimant's unemployment was not a direct result of her compensable injury.

However, the hearing officer erred in making Finding of Fact No. 6, which reads: "During the qualifying period for the 2nd quarter, Claimant was not satisfactorily participating

in a full time vocational rehabilitation program sponsored by the [TRC] or by a private provider." The hearing officer appears to have not taken into account the claimant's documentary evidence presented by the claimant in support of her TRC-participation argument, e.g., her Individualized Plan for Employment (IPE) and the letter from a TRC counselor indicating that the claimant is "compliant" with their program generally and her IPE specifically. The hearing officer seems to be relying on the claimant's response to one of his questions about whether she thought she was satisfactorily participating in a full-time TRC program, a question clearly requiring a legal conclusion in response and thus objectionable. Regarding the issue of good faith search for employment, Rule 130.102(d)(2) provides that an injured employee has made a good faith effort to obtain employment commensurate with her ability to work if the employee has been enrolled in, and satisfactorily participated in, a full-time vocational rehabilitation program sponsored by the TRC *during* the qualifying period. We have often held that the good faith aspect of the claimant's job search is met, per the rule, if at any time *during* the qualifying period for the quarter in dispute, the claimant is enrolled and successfully participating in a TRC-sponsored program. *See* Texas Workers' Compensation Commission Appeal No. 010639, decided April 25, 2001, and Texas Workers' Compensation Commission Appeal No. 001536, decided August 9, 2000. The claimant argued at the CCH and on appeal that she did everything the TRC asked her to do, including taking assessments of her work abilities, a work hardening course, and a series of classes with a job interview trainer. The claimant's IPE covered the time frame of May 21 to December 31, 2001; thus, the claimant's TRC participation was during the qualifying period, June 9 through September 7, 2001.

The hearing officer's decision and order regarding extent of injury, direct result, and SIBs eligibility is therefore affirmed; Finding of Fact No. 6 is reversed, for the above-stated reasons, and we render that the finding read as follows: "During the qualifying period for the 2nd quarter, Claimant was satisfactorily participating in a full time vocational rehabilitation program sponsored by the [TRC] or by a private provider."

The true corporate name of the carrier is **LIBERTY MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Terri Kay Oliver
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

DISSENTING OPINION:

I dissent from the majority opinion's reversal of the hearing officer's finding on good faith search, which is a clear substitution of Appeals Panel judgment for that of the hearing officer. Also, the majority has reversed on a point not appealed by the claimant.

The qualifying period ran from June 9 through September 7, 2001. While there was an initial vocational assessment in August 2001, Texas Rehabilitation Commission (TRC) records in evidence document no further participation at all with the claimant's "plan" until December 2001, after the qualifying period. Moreover, her plan also calls for searching for employment, which was not done during the qualifying period. The TRC counselors letter upon which this broad reversal is based is dated February 2002 and says that the claimant is "currently compliant" with the plan. It is essentially no evidence, for the qualifying period, of satisfactory participation. On top of this, the rather helpful question that the hearing officer asked, whether the claimant thought her participation was satisfactory during the qualifying period, was answered with the claimant saying she did not know if she had because she never got into the retraining portion of the plan. (This question was neither "objectionable" as stated in the majority opinion nor objected to by the claimant's attorneys.) I note that later in the questioning, the claimant agreed she was not able to follow through on vocational counseling recommendations because of bronchitis; follow-through was also part of her plan.

It is not the existence of a plan alone or even participation in some of the activities set out therein that carries the day--there must be "satisfactory participation" as well as enrollment in such a plan for it to be considered the basis of a good faith search. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(2) (Rule 130.102(d)(2)). This is a fact determination. Although the majority opinion charges the hearing officer with overlooking or ignoring the evidence, to the contrary it is apparent to me he considered all the evidence and saw that it preponderated against a demonstration of satisfactory participation during the qualifying period. The letter from the TRC counselor simply does not constitute a great weight against the finding, and the hearing officer's decision is readily affirmable.

Susan M. Kelley
Appeals Judge